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Krajewski, Michal Andrzej

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Who is Afraid of the European Council?

The Court of Justice's Cautious Approach to the Independence of Domestic Judges

ECJ, Case C-216/18 PPU: The Minister for Justice and Equality v LM

Michał Krajewski*

INTRODUCTION

The *LM*¹ case offered first proof of the expected disruptions to judicial cooperation between EU Member States and Poland due to its controversial judicial reforms.² The case concerned a man accused of drug trafficking who had subsequently fled to Ireland. A Polish court issued a European Arrest Warrant for Mr. LM for the purpose of conducting a criminal prosecution. The Irish High Court, which was to decide on the surrender of Mr. LM to Poland, doubted the ability of Polish courts to ensure a fair trial. It relied most of all on the Commission's reasoned proposal, submitted to the Council under Article 7(1) TEU, to state a clear risk of a serious breach by Poland of the rule of law.³ Hence, it made a preliminary reference to the Court of Justice asking whether cogent evidence of systemic breaches to judicial independence in a Member State issuing an EAW provided sufficient grounds to refuse its execution. The Court of Justice, however, held fast to its earlier approach, as laid out in *Aranyosi and Căldăraru*,⁴ aimed at limiting exceptions to the principle of mutual recognition. It stated that it was also necessary to consider the individual situation of the person sought by the EAW, and to determine whether that person ran the risk of undergoing an unfair trial in the issuing Member State.

Some commentators had hoped that the Court would authoritatively assess the state of judicial independence in Poland.⁵ The Polish, Hungarian and Spanish governments intervened before the Court with a contrary view in opposition to the idea that judicial independence in a Member State could be assessed by foreign courts or by the Court of Justice. These governments claimed that only the European Council was empowered to state systemic deficiencies in the rule of law in a Member State under Article 7(2) TEU.⁶ Importantly, the first, preventive stage of the procedure under Article 7(1) TEU against Poland is still pending before the Council.

* PhD Researcher at the European University Institute in Florence.

¹ ECJ 25 July 2018, Case C-216/18 PPU, *The Minister for Justice and Equality v LM*.

² W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', *Sydney Law School Legal Studies Research Paper* (2018).

³ European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland', 20 December 2017, COM(2017) 835 final.

⁴ ECJ 5 April 2016, Case C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

⁵ P. Bárd and W. van Ballegoij, 'Judicial Independence as a Precondition for Mutual Trust', *Verfassungsblog*, 10 April 2018, available at <https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust>, visited 6 September 2018.

⁶ Statement of observations submitted by Poland in Case C-216/18 PPU, *The Minister for Justice and Equality v LM*, 7 May 2018, published by the Helsinki Foundation of Human Rights, available at <http://www.hfhr.pl/wp-content/uploads/2018/08/uwagi-Polski.pdf>, visited 6 September 2018; A. Dori, 'Hic Rhodus, hic salta: The ECJ Hearing of the Landmark "Celmer" Case',

LM has raised a variety of issues regarding the operation of mutual trust and mutual recognition. However, this commentary focusses on the potential impact of EU law and EU institutions on domestic judicial independence in the aftermath of *LM*. Firstly, it analyses the considerable difficulties entailed by the 'abstract' prong of the test prescribed by the Court. These difficulties are related to the legal nature of judicial independence, which is operationalised very differently by the various EU Member States. Domestic courts may have difficulty assessing foreign laws that affect the functioning of their counterparts in other Member States, which speaks in favour of a centralised review of judicial independence by the Court of Justice.

Secondly, the commentary reflects on a partial solution to said problem in the current Polish context. It argues that when courts are asked to rule on the execution of Polish EAWs or other judicial decisions, they should focus, within the abstract prong, on those elements of the Polish reforms that have an impact on rank-and-file judges. What is crucial in this respect is the new legal regime of disciplinary proceedings for rank-and-file judges, as well as the institutional and political context in which this regime is being implemented.

Thirdly, the commentary explores how the Court has conceived of the division – between itself, domestic courts, the European Council and the Commission – of powers and responsibility to assess domestic judicial independence. It is argued that the Court's approach in *LM* to its own powers and responsibility contrasts with that in *Associação Sindical dos Juízes Portugueses (ASJP)*.⁷ In *ASJP*, which was settled a few months earlier, the Court had firmly asserted its mandate stemming from Article 19(1), para 2, TEU to autonomously scrutinise domestic measures affecting judicial independence, even if such measures did not implement specific EU provisions. In *LM*, on the contrary, the Court delegated the assessment of the Polish system entirely to domestic courts executing EAWs. Moreover, ignoring the suggestion of the referring court, the Court upheld the second, 'concrete' prong of the double test transplanted from *Aranyosi and Căldăraru*. This prong might render excessively difficult the review of the risk of unfair trials in issuing Member States. The Court's reasoning suggests that it sought to avoid an automatic ban on surrenders to Poland so as not to pre-empt a decision by the European Council under Article 7(2) TEU. The latter depends however on political factors and may actually never be reached.⁸ As a consequence, domestic judicial independence may not receive a level of protection under EU law as strong as one might have expected in the aftermath of *ASJP*.⁹

THE COURT'S JUDGMENT AND ITS BACKGROUND

The High Court had submitted two questions to the Court of Justice. First, should the test for the risk of unfair trials in the issuing Member State be essentially abstract? Does cogent evidence of systemic breaches to judicial independence in a Member State issuing the EAW provide sufficient grounds to refuse the surrender? Or is it also necessary to carry out a concrete test, as in *Aranyosi and Căldăraru*, focussed on an individualised risk to the person being sought pursuant to the EAW? Second, if the

Verfassungsblog, 6 June 2018, available at <<https://verfassungsblog.de/hic-rhodus-hic-salta-the-ej-hearing-of-the-landmark-celmer-case/>>, visited 6 September 2018.

⁷ ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (ASJP)*.

⁸ Similar arguments have been presented by M. Wendel, 'Afraid of Their Own Courage? Some Preliminary Reflections on LM', *Verfassungsblog*, 26.7.2018, available at <<https://verfassungsblog.de/afraid-of-their-own-courage-some-preliminary-reflections-on-lm/>>, visited 10 October 2018.

⁹ M. Ovádek, 'Has the CJEU just Reconfigured the EU Constitutional Order?', *Verfassungsblog*, 28 February 2018, available at <<https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>>, visited 6 September 2018.

concrete prong turns out to be necessary, what kind of information should be demanded from the issuing court to discount the risk of an unfair trial in the individual case?

AG Tachev opined that a potential breach of Article 47 of the Charter is capable of justifying the postponement of surrender, but only if it amounted to a 'flagrant denial of justice'.¹⁰ He also proposed transplanting the two-prong test from *Aranyosi and Căldăraru*.¹¹ Following the general lines of reasoning taken by AG Tachev, the Court confirmed that a breach of judicial independence – the essence of the right to a fair trial and the core building block of mutual trust – was capable of authorising an exception to the execution of EAWs.¹² Although such an exception is not expressly provided for in the Framework Decision,¹³ the Court did note that Article 1(3) confirms an obligation to respect fundamental rights.¹⁴ However, the Court did not endorse the concept of 'flagrant denial of justice' proposed by AG Tachev, endorsing instead a lower threshold for 'a real risk of breach'.¹⁵ The AG's proposal has been criticised for imposing an impossible burden of proof on the applicant¹⁶ and for ignoring the underlying idea of mutual trust in a high level of fundamental rights protection across the EU.¹⁷

The Court did not autonomously assess the state of judicial independence in Poland. It also silently disregarded a tentative assessment proposed by the referring judge. In the latter's view, 'the recent legislative changes have been so damaging to the rule of law that... the common value of the rule of law in Poland has been breached.'¹⁸ Relying on the Commission's reasoned proposal submitted under Article 7 TEU, and the opinions of the Venice Commission, the referring judge noted that the membership of the Constitutional Tribunal and the National Council of the Judiciary had been altered, and that the Minister of Justice and the Public Prosecutor General had been merged into one office while attributing disciplinary powers over court presidents to them. As a result, independent constitutional review of legislation and fair criminal trials were no longer possible in Poland.¹⁹

The Court did not reformulate the questions of the referring judge to verify this assessment. It merely confirmed that an adequate test for the risk of unfair trials would need to be two-pronged. Firstly, executing courts would have to find systemic and generalised deficiencies liable to affect the judiciary in the issuing Member State. Executing courts are bound by standards derived from Article 47 of the Charter. The Court restated these standards in very general terms. It mentioned explicit legislative rules regarding judicial appointments, protection against removal from office, a level of remuneration commensurate with the importance of judicial functions, and rules preventing the use of disciplinary

¹⁰ Opinion of AG Tachev in ECJ 28 June 2018, Case C-216/18 PPU, *Minister of Justice and Equality v LM*.

¹¹ *Aranyosi and Căldăraru*, *supra*, n. 4.

¹² *LM*, *supra* n. 1, para 59.

¹³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1-20, as amended.

¹⁴ *LM*, *supra* n. 1, paras. 44-45.

¹⁵ This concept appears in the case law of the ECtHR and seems to suggest a very strict approach to the possibility of non-surrender. See, AG Tachev, *Minister of Justice and Equality v LM*, paras. 72, 76, 81-85. Notably, according to AG Tachev the breach of the right to an independent judge does not seem to always amount to a flagrant denial of justice. See, *ibid.* para 90.

¹⁶ P. Bárd, W. van Ballegooij, 'The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue', *Verfassungsblog*, 2 July 2018, available at <<https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue/>>, visited 11 October 2018.

¹⁷ P. Sonnevend, 'A Clever Compromise or a Tectonic Shift? The LM Judgment of the CJEU', *Verfassungsblog*, 27 July 2018, <https://verfassungsblog.de/a-clever-compromise-or-a-tectonic-shift-the-lm-judgment-of-the-cjeu/>, visited 11 October 2018;

¹⁸ Request for preliminary ruling by the High Court of Ireland in *Minister for Justice and Equality v LM*, 25 March 2018, para. 27, published by the Helsinki Foundation of Human Rights, available at <<http://www.hfhr.pl/wp-content/uploads/2018/08/wniosek-prejudycjalny.pdf>>, visited 6 September 2018.

¹⁹ *Ibid.* para 28.

proceedings to influence the judicial decision-making.²⁰ The Court indicated that domestic courts must rely on material that is 'objective, reliable, specific and properly updated'. It immediately added that 'information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is *particularly relevant* for the purposes of that assessment.'²¹

Secondly, executing courts must establish substantial grounds for believing that the requested person faces the risk of an unfair trial in the issuing Member State due to the particular circumstances of her case. AG Tachev mentioned, for instance, the fact of belonging to a discriminated social group, or the political nature of the offence for which the person is being sought, although these factors were not repeated by the Court.²² What the Court did find relevant was whether the systemic deficiencies affected specifically those courts which have jurisdiction over the requested person's case, following her surrender.²³ To verify the individualised risk, the executing court should request 'supplementary information' or 'any objective material' from the issuing court under Article 15(2) of the Framework Decision.²⁴ At this point, it should be emphasised that, despite an explicit question from the referring judge about the specific types of evidence suitable for the concrete test, the Court nowhere specified what kind of 'supplementary information' or 'objective material' it had in mind. Importantly, the referring judge had indicated that in the Polish case, the controversial legal regime applied to all rank-and-file judges. Hence, the concrete prong seemed redundant.²⁵ The referring judge had opined: 'where there are such egregious defects in the system of justice, it appears unrealistic to require a requested person to go further and demonstrate how, in their individual case, these defects will affect their specific trial'.²⁶ Would a declaration by the issuing Polish judge that she had not (yet) been subjected to political pressure, or that the case was of no political nature, qualify as 'supplementary information' or 'objective material'?

What is crucial is how the Court justified the upholding of the concrete prong. The Court's reasoning suggests that not only did it aim to preserve the principle of mutual recognition, but also to distinguish its own competence from that of the European Council. The Court seems to have followed the interpretation of juxtaposed Articles 7(2) TEU, 19(1) TEU and 47 of the Charter, as suggested by AG Tachev. The AG had opined that the Court was responsible for fair trials in individual cases, whereas the European Council managed the systemic compliance of domestic judicial systems with the rule of law.²⁷ In support of the concrete prong, the Court cited recital 10 of the Framework Decision, according to which the EAW mechanism could be suspended 'only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU'.²⁸ In the event of such a decision by the European Council, the Council could, under Article 7(3) TEU, suspend certain Treaty rights of the concerned Member State, including the operation of the EAW Framework Decision in respect of that Member State. The Court emphasised

²⁰ *LM*, *supra* n. 1, paras. 62-68.

²¹ *Ibid.*, para 61 (emphasis added).

²² Opinion of AG Tachev, *supra* n. 10, para 113.

²³ *LM*, *supra* n. 1, para 74

²⁴ *Ibid.*, para 76-77.

²⁵ *Ibid.*, para 52.

²⁶ Request for preliminary ruling, *supra* n. 18, para 51.

²⁷ Opinion of AG Tachev, *supra* n. 10, paras. 38-45.

²⁸ *LM*, *supra* n. 1, para 70.

that only in such an event could the execution of EAWs issued by this Member State be refused *automatically*, without the need to carry out the concrete test.²⁹

COMMENTS

How to judge Judicial Independence?

The abstract prong requires a complex assessment of alleged deficiencies in the affected judicial system. In my view, given this complexity, as well as the need to ensure legal certainty and the predictability of judicial decisions across the EU, the Court should have provided a more detailed interpretation of judicial independence standards, or even immediately applied them to the Polish context. The judicial reforms in Poland will most likely affect not only the EAW mechanism but all 26 EU acts providing for mutual recognition of judicial decisions in criminal and civil matters.³⁰ New tasks imposed on domestic courts executing Polish judicial decisions will significantly prolong proceedings and may result in divergent decisions, thereby undermining legal certainty. It could be argued the Court of Justice would have difficulty in constantly monitoring the rapidly changing situation in Poland.³¹ I believe however that even if the Court were to assess the situation several times, the centralised assessment would still provide more legal certainty than the solution chosen in *LM*.

It has also been argued that the Court needed to remain within the boundaries of the question asked by the High Court. The new legal regime in Poland, as the argument goes, was not the core concern of the Court of Justice.³² It should be emphasised however that under Article 19(1), para 1, TEU the Court is called upon to ensure the observance of EU law across the EU. This includes ensuring the standards of judicial independence inherent to effective judicial protection. The latter is guaranteed – in the fields covered by EU law – by Article 19(1), para 2, TEU. To ensure the observance of EU law, the Court enjoys ‘procedural freedom’ in the preliminary reference procedure, manifested by the competence to reformulate the questions asked or invoke provisions of EU law which have not been invoked by the referring court.³³ The previous case law confirms the Court’s great leeway in deciding whether to provide the referring court with a merely general and abstract interpretation of relevant EU provisions or a more detailed interpretation, tantamount to an application of law.³⁴ For instance, in

²⁹ *Ibid.*, para 72.

³⁰ A. Frąckowiak-Adamska, ‘Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the *LM* Case’, *Verfassungsblog*, 30 July 2018, available at <<https://verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case/>>, visited 12 October 2018. The author noted, for instance, the clear preference expressed by the Polish Minister of Justice regarding how Polish courts should apply Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338, 23.12.2003, p. 1–29.

³¹ D. Kosař, ‘The CJEU Has Spoken Out, But the Show Must Go On’, *Verfassungsblog*, 2 August 2018, available at <<https://verfassungsblog.de/the-cjeu-has-spoken-out-but-the-show-must-go-on/>>, visited 13 October 2018.

³² M. Bonelli, ‘The Deficiencies Judgment: Postponing the Constitutional Moment’, *Verfassungsblog*, 27 July 2018, available at <<https://verfassungsblog.de/the-deficiencies-judgment-postponing-the-constitutional-moment/>>, visited 11 October 2018.

³³ R. Barents, ‘EU Procedural Law and Effective Legal Protection’, (2014) *Common Market Law Review* 51, 1437–1462, at 1455.

³⁴ Formally, the Court provides an interpretation of the applicable EU norms, whereas the referring court applies this interpretation to the main case. However, in practice this distinction is blurred. It has been observed that the Court has been moving towards a more concrete style of interpretation, firmly embedded in the facts of the case, which is tantamount to law application. M. Broberg, N. Fender, ‘Preliminary References’, in R. Schütze, T. Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018), p. 981–1010, at p. 1007; K. Lenaerts *et al.*, *EU Procedural Law* (Oxford University Press 2014), p. 231–243.

*Aranyosi and Căldăraru*³⁵, the Court had not carried out an autonomous assessment of prison conditions in Hungary, merely indicating factors that executing courts should consider, and pointing to the relevant types of evidence. In *N.S.*, on the contrary, the Court did confirm the overburdening of the asylum system in Greece, relying on the judgments of the ECtHR.³⁶

In my view, the very general interpretation of judicial independence standards provided by the Court in *LM* is not sufficient to guarantee the fundamental rights of persons subject to Polish EAWs or other judicial decisions. The Court only briefly mentioned the rules for judicial appointments, guarantees against removal from office, a level of remuneration commensurate with the importance of the function and a fair disciplinary regime.³⁷ But the problem for domestic courts lies in the major differences between how the Member States operationalise judicial independence. There are multiple models for judicial appointments and disciplinary regimes involving a variety of judicial and non-judicial actors. The rules for judicial appointments, disciplinary actions, immunities, removal from office, and remuneration cannot be analysed in isolation but are all part of a system that should be seen holistically. One cannot simply focus on a comparison of discrete legal arrangements. Due to said complexity, domestic courts should be deemed ill-equipped to assess foreign laws regarding the organisation of judicial systems. This task requires an in-depth knowledge of the law and practice of the foreign system, as well as a holistic perspective. For instance, a firmly embedded practice of the secondment of German or Polish judges to the ministries of justice could be deemed unconstitutional in other EU Member States. The same applies to the powerful position of court presidents in many Central and Eastern European States, or to the French solution by which the members of the Council of State, the supreme administrative court, also function as advisors to the executive.³⁸

Another illustration of this difficulty was provided by the Polish government in proceedings before the Court of Justice, at which the Polish government alluded to sustained controversy regarding judicial appointments in Ireland.³⁹ The point was to illustrate that one cannot expect ordinary courts to infallibly assess the independence of their foreign counterparts; ordinary courts will likely apply criteria of judicial independence derived from their own legal systems. According to the Polish government, if Polish courts were to apply their own criteria, they might end up having doubts about the independence of Irish courts. Formally, the discretion of political authorities with regard to judicial appointments is far more restrained in Poland than in Ireland.⁴⁰ The Polish President can only appoint judges from a list of candidates presented by the National Council of the Judiciary, the majority of whose members are judges themselves.⁴¹ The Irish President, on the contrary, appoints judges upon the proposal of the government, and recommendations to the latter by the Judicial Appointments Advisory Board are not binding.⁴² Obviously, this comparison is selective and overly simplistic. The information provided does not in itself lead to the conclusion that Irish judges are subordinate to the political authorities that appointed them. But the argument of the Polish government shows that even though it is possible to formulate general and abstract criteria of judicial independence, their application requires a holistic, in-depth and contextual analysis. The Court has

³⁵ *Aranyosi & Căldăraru*, *supra*, n. 4. See also, ECJ 25 July 2018, Case C-220/18 PPU, *ML*, where in paras. 67-71, the Court explicitly refused to ascertain the facts regarding prison overcrowding in Hungary.

³⁶ ECJ 21 December 2011, Case C-411/10 and C-493/10, *N.S. et al. v Secretary of State for the Home Department et al.*, para 89.

³⁷ *Ibid.*, 64-66.

³⁸ The examples chosen by Kosař, *supra*, n. 31.

³⁹ S. Gilhooly, 'The Peter Principles', *The Parchment*, Autumn 2012, p. 29-32, at p. 30.

⁴⁰ Statement of Poland, *supra* n. 6, para 29.

⁴¹ Articles 179 and 187 of the Constitution of the Republic of Poland of 2 April 1997, Dz.U. 1997, Nr 78 poz. 483.

⁴² Article 13 of the Irish Court and Court Officers Act of 1995.

adequate resources to carry out such an analysis. Unlike domestic courts, the Court is a multinational institution with potentially far-reaching procedural tools. The highest authorities of an affected Member State may intervene in preliminary reference proceedings by submitting written and oral observations. The Court may also take evidence and seek further information from them.⁴³

The Court clarified only certain general elements of the abstract test. It began by qualifying judicial independence as forming part of the *essence* of the fundamental right to a fair trial.⁴⁴ According to Article 52 of the Charter, any limitations to fundamental rights and freedoms must respect their essence. The essence of a fundamental right ‘epitomises the untouchable core that should under no circumstances be restricted or interfered with.’⁴⁵ Evidently, judicial independence can be guaranteed to a greater or lesser extent by various legal safeguards. But, for the purposes of compliance with the fundamental right to a fair trial, it must be treated as a binary legal norm that cannot be subject to any legitimate limitation or proportionality balancing. Hence, an executing court must decide whether the concerned Member State has failed to meet the required threshold of judicial independence and thus given rise to a real risk of breach of the fundamental right to a fair trial.

Such an assessment necessarily entails a discretionary judgment. The concept of judicial independence is based on *appearance*.⁴⁶ There are no infallible mechanisms ensuring judicial objectivity. The best that can be done is to create an appearance of independence: an institutional and procedural system which, in the eyes of reasonable observers, minimises the probability of undue interference with the decisions of courts.⁴⁷ The aim, as the Court put it, is to ‘dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.’⁴⁸ The assessment of whether a foreign judicial system gives rise to an appearance of independence, as already argued, requires a complex assessment which might lead to deep controversy. The latter might concern not only the results of the assessment but also the cognitive ability of a rank-and-file foreign judge to carry it out or the right of the Member State concerned to be heard before the executing judge.⁴⁹

Two Minutes to Midnight

To facilitate the task of domestic courts, the Court has emphasised the ‘particular relevance’ of the Commission’s reasoned proposal.⁵⁰ Domestic courts cannot, however, assume that as soon as the reasoned proposal has been submitted, the abstract test is automatically fulfilled. In my view, the ‘particular relevance’ may be interpreted as referring to the evidential value only. The decision-maker within the pending Article 7(1) TEU procedure is the Council (which needs to obtain the consent of

⁴³ Articles 61, 62, 80 and 96 of the ECJ Rules of Procedure of 25 September 2012, OJ L 265, 29.9.2012, as amended.

⁴⁴ Fair trial, in turn, is inherent to the concepts of effective judicial review and the rule of law and forms the basis for mutual trust. *LM*, *supra* n. 1, paras. 49, 51, 56-58.

⁴⁵ M. Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core’, 14 *EUConst* (2018), p. 332-368, at p. 367. For the criticism of such an absolutist theory of essence see, R. Alexy, *Theory of Constitutional Rights* (Oxford University Press 2010), p. 192-196.

⁴⁶ An idea expressed by the formula: ‘justice must not only be done, but also seen to be done’. See, for instance, ECtHR 9 June 1998, Case 41/1997/825/1031, *Incal v Turkey*, paras. 71; ECtHR 30 November 2010, Case 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, paras. 45-46 and the previously cited case law.

⁴⁷ P. Gillaux, *Droit(s) européen(s) à un procès équitable* (Bruylant 2012), p. 15-23.

⁴⁸ *LM*, *supra* n. 1, para 66.

⁴⁹ I am grateful to Maciej Taborowski for this last point.

⁵⁰ *LM*, *supra* n. 1, para 61.

the European Parliament), not the Commission.⁵¹ Article 47 of the Charter requires that courts autonomously establish and assess the facts of each case, providing compelling justifications of their findings. Judges are subject only to law and may not assume to be bound by instructions or assessments of administrative authorities,⁵² including the Commission. Otherwise, reasoned proposals could be deemed to be acts which ‘produce legal effects vis-à-vis third parties’, within the meaning of Article 263(4) TFEU.⁵³ The legality of such acts could be challenged before the Court with an action for annulment lodged by an affected Member State, or by other Member States and EU institutions as well.⁵⁴ The Court’s review in such a procedure covers both procedural and substantive grounds.⁵⁵ This would be somewhat paradoxical; under Article 269 TFEU the Court can review final decisions of the European Council, taken on the basis of reasoned proposals, on procedural grounds only. Moreover, as the Commission itself has noted, the reasoned proposal submitted in the Polish case stated only that there was a ‘clear risk’ of a serious breach of the rule of law under Article 7(1) TEU, a concept which is different from that of a ‘serious and persistent breach’ under Article 7(2) TEU. Only the latter can result in imposing sanctions, including a suspension of the EAW mechanism.⁵⁶

From this, it follows that domestic courts should autonomously assess, within the abstract prong, the information provided in the Commission’s reasoned proposal. In my view, they should particularly consider direct threats to the independence of rank-and-file judges who decide ordinary criminal or civil cases. The independence of rank-and-file judges is crucial for the fluent functioning of EAWs and other mutual recognition mechanisms. However, this issue is overshadowed in the reasoned proposal regarding Poland by the analysis of damage to the highest judicial bodies. The reasoned proposal devoted the most attention to the unconstitutional changes in the membership of the Constitutional Tribunal responsible for the constitutional review of legislation, the Supreme Court responsible for maintaining the uniformity of case law, and the National Council of the Judiciary responsible for judicial appointments.⁵⁷ But how do the changes to the highest judicial bodies, even if manifestly unconstitutional, affect the fairness of individual criminal trials presided over by rank-and-file judges? What is crucial in this respect are the new powers of the Minister of Justice to influence disciplinary proceedings against rank-and-file judges. The problem is that, in its reasoned proposal, the Commission devoted only a footnote to this paramount issue!⁵⁸ It would seem that the issue has however been noticed and underscored by the Court. The Court devoted a separate paragraph to it and prescribed a new formula, stating that ‘the disciplinary regime... must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.’⁵⁹

⁵¹ Statement of Poland, *supra* n. 6, para 8.

⁵² ECJ 15 May 1986, Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*. See also, ECtHR 24 November 1994, Case No. 15287/89, *Beaumartin v France*, para 38; ECtHR 21 July 2011, Case No. 32181/04 and 32122/05, *Sigma Radio Television v Cyprus*, para 157.

⁵³ In such a case, domestic courts could also inquire with the Court about the validity of reasoned proposals, under Article 267 TFEU.

⁵⁴ AG Jacobs, 15 September 2005, Case C-301/03, *Italy v Commission*, paras. 57-72. For an example of the approach, see, EGC 13 December 2016, Case T-713/14, *International and European Public Services Organisation v ECB*.

⁵⁵ Article 263(2) TFEU.

⁵⁶ Statement of observations submitted by the Commission in Case C-216/18 PPU, *The Minister for Justice and Equality v LM*, 7 May 2018, para 8, published by the Helsinki Foundation of Human Rights, available at <<http://www.hfhr.pl/wp-content/uploads/2018/08/uwagi-Komisji.pdf>>, visited 13 October 2018.

⁵⁷ Article 186(2) of the Polish Constitution, *supra* n. 41.

⁵⁸ European Commission, *supra*, n. 3., footnote 91. See also, paras. 133-135.

⁵⁹ *LM*, *supra* n. 1, para 67.

The Polish Minister of Justice can, at present, initiate disciplinary proceedings against any judge, and appoint and supervise a disciplinary prosecutor. The Minister single-handedly selects first-instance disciplinary judges.⁶⁰ The membership of the Disciplinary Chamber of the Supreme Court, acting as a disciplinary court of final instance, will be proposed to the President by the National Council of the Judiciary,⁶¹ which is now composed in majority of judges closely associated with the Minister of Justice. Due to its lack of independence from the political authorities, the National Council of the Judiciary has had its membership in the European Network of Councils for the Judiciary suspended.⁶² Importantly, disciplinary proceedings may concern the substance of a judicial decision, if the decision is believed to contain a ‘manifest breach of law’.⁶³ A reasonable observer might perceive a ‘chilling effect’: at least some judges will refrain from rendering judgments against the expressed or assumed preferences of the Minister of Justice and the political majority. What is also important is that the new powers of the Minister of Justice to appoint, dismiss and supervise court presidents are formally subject to review by only the National Council of Judiciary.⁶⁴ Court presidents clearly have the instruments at their disposal to effectively influence the decision-making of rank-and-file judges.⁶⁵ They assign judges to chambers, appoint chamber presidents, have powers with regard to case allocation and withdrawing, process complaints from court users, and can demand the initiation of disciplinary proceedings.⁶⁶

This brief analysis shows that the appearance of judicial independence in Poland has been seriously undermined. Even though cases involving the politically-motivated dismissal of rank-and-file judges have yet to be reported, there is already substantial evidence of political pressure aimed at affecting the substance of individual judgments. There are also reports of preliminary disciplinary actions being initiated against rank-and-file judges for their public statements in defence of judicial independence, or the substance of their decisions, including decisions to make preliminary references to the Court of Justice.⁶⁷ It could be concluded that the current legal regime in Poland enables political pressure on rank-and-file judges, no matter what type of case they are hearing. Judicial independence, rather than rely on institutional guarantees, now seems to depend exclusively on the personal character traits of individual judges.

Who is the Judge of Judicial Independence in the EU?

In the preliminary reference, the High Court opined that the concrete prong was inadequate, as it appeared difficult to detach the probability of unfair trials in individual cases from general concerns

⁶⁰ Articles 110a-110c, 112-112d of the Act of 27 July 2001 on the organisation of common courts, Dz.U. 2016 r. poz. 2062, as amended or added by Articles 108(17-19) of the Act of 8 December 2017 on the Supreme Court, Dz.U. 2018 r., poz. 5.

⁶¹ Article 27 of the Act on the Supreme Court, *ibid.* Venice Commission, Opinion No. 604/2017, 11 December 2017, para 91.

⁶² See, ‘Position Paper of the Board of the ENCJ on the membership of the KRS of Poland’, p. 3-4, available at <<https://www.ency.eu/index.php/node/492>>, visited 13 October 2018; and the information on the suspension available at <<https://www.ency.eu/node/495>>, visited 13 October 2018.

⁶³ Report by the Legal Experts Team of Batory Foundation, 14 March 2018, available in Polish at <http://www.batory.org.pl/dla_mediow/raport_fundacji_batorego_o_demontazu_sadownictwa>, visited 6 September 2018, p. 15-16.

⁶⁴ Venice Commission, Opinion No. 904/2017, 11 December 2017, para 100 *et seq.*

⁶⁵ European Commission, *supra* n. 3, para 157 *et seq.*

⁶⁶ Venice Commission, *supra* n. 64, paras. 121-126. On the role of court presidents in the Central and Eastern Europe see, D. Kosař, K. Šípulova, ‘The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule’, 10 *Hague Journal of the Rule of Law* (2018), p. 83-110, at p. 97.

⁶⁷ Stowarzyszenie Sędziów Polskich “Iustitia” [Association of Polish Judges “Iustitia”], *Stan Niezależnego Sądownictwa w Polsce. Raport z Badań i Analiz* [The State of Independent Judiciary in Poland. Research and Analysis Report], October 2018, available in Polish at <https://www.iustitia.pl/images/pliki/Raport_Iustitia.pdf>, visited 12 October 2018.

about judicial independence.⁶⁸ These are two sides of the same coin.⁶⁹ As all rank-and-file judges no longer enjoy protection from political pressure, citizens have reasonable grounds to doubt the fairness of any trial. The Court however upheld the concrete prong in *LM*. Following this judgment, the referring court noted that the Polish Deputy Minister of Justice had publicly called LM, prior to conviction, a ‘dangerous criminal from a drug mafia’. This could be construed as illicit pressure on a court that would hear the LM case.⁷⁰ Importantly, under Article 6 of the ECHR, public pressure exerted on judges by senior politicians can amount to an undermining of the appearance of judicial independence and, consequently, to a breach of the right to a fair trial.⁷¹ As a result, the Irish judge referred additional questions to the issuing court in Poland. The latter’s reply provides evidence that the concrete test may not work in practice. According to press information, the reply to the Irish judge was drafted by a new president of the issuing court who had been appointed by the current Minister of Justice. The court president assured the Irish judge of the independence of Polish courts. In reaction, the Irish judge once again requested information from the judge who had issued the EAW; this request is pending.⁷² Other courts executing Polish judicial decisions have also requested additional information from Polish courts, but the latter have focussed on publicly available information on the legislative measures introduced.⁷³ Clearly, any judge who provided a foreign court with information about political pressure being exerted would face disciplinary action. In my view, this demonstrates the inappropriateness of the concrete test.

The Court of Justice rejected the Irish judge’s scepticism of the concrete prong for two reasons. First, the general pattern of the Court’s reasoning suggests that exceptions to the principles of mutual trust and mutual recognition must be construed as narrowly as possible; hence, they may only be applied in concrete cases. But the main argument in favour of the concrete test was recital 10 of the Framework Decision, according to which the implementation of the EAW mechanism may be suspended only on the basis of decision by the European Council, pursuant to Article 7 TEU.⁷⁴ The Court distinguished between its own competence and the competence of the European Council. It seemed to follow the arguments presented by national governments and the Commission, which claimed that, had it not been for the concrete test, the Court could have circumvented the pending Article 7 TEU procedure and pre-empted the assessment of the European Council.⁷⁵

The Court could have prescribed, in my view, a purely abstract, one-prong test without exceeding its competence, even if this amounted to an automatic ban on surrenders to Poland. The power of the Council to suspend the operation of the EAW mechanism following a decision by the European Council is only mentioned expressly in a recital of the Framework Decision. Article 7(3) TEU lays

⁶⁸ The Irish High Court, *Minister for Justice and Equality v LM*, *supra*, n. 18, paras. 27-28, 51-52.

⁶⁹ Bárd and van Ballegooij argue, quite to the contrary, that the Court should have framed the issue in *LM* in rule-of-law terms instead of fair-trial terms. See, Bárd and van Ballegooij, *supra*, n. 16.

⁷⁰ The High Court of Ireland, *The Minister for Justice and Equality v Artur Celmer*, 1 August 2018, available at <<https://www.bailii.org/ie/cases/IEHC/2018/H484.html>>, visited 11 October 2018, paras. 30-31.

⁷¹ ECtHR 9 February 2012, Case 42856/06, *Kinský v the Czech Republic*, paras. 95-97.

⁷² K. Sobczak, ‘Sąd z Irlandii nie wierzy prezesowi i pyta o praworządność sędziego’, available at <<https://www.prawo.pl/prawnicy-sady/sad-z-irlandii-pyta-o-niezaleznosc-polskich-sadow,313063.html>>, visited 12 October 2018.

⁷³ K. Skory, ‘Rzeszowski sąd odpowiada na pytania Hiszpanów o niezależność’, available at <<https://www.rmfm24.pl/raporty/raport-batalia-o-sady/fakty/news-rzeszowski-sad-odpowiada-na-pytania-hiszpanow-o-niezaleznosc,nId,2641864>>, visited 12 October 2018.

⁷⁴ *LM*, *supra* n. 1, paras. 70-71.

⁷⁵ Dori, *supra* n. 6; Statement by Poland, *supra* n. 6, para 24. The Court itself had used this line of argumentation in ECJ 30 May 2013, Case C-168/13 PPU, *Jérémy F v Premier Ministre*, para 49. See also, Case C-404/15 and C-659/15 PPU, *Aranyosi & Căldăraru*, Opinion of AG Bot, para 87.

down a general competence for the Council to 'to suspend certain of the rights deriving from the application of the Treaties to the Member State in question' but does not specifically mention suspension of the EAW mechanism. An act of secondary law, let alone its recital, cannot modify the power and obligation assigned to the Court and domestic courts by primary law to secure effective legal protection in fields covered by EU law. Besides, nothing suggests that Article 7 TEU had introduced any restriction on the powers and obligations of the EU judiciary with regard to effective judicial protection inherent to the rule of law. The fact that the rule of law is also protected before a political body by means of the procedure under Article 7 TEU stems from its fundamental nature in EU law, which requires such additional safeguards.⁷⁶ Moreover, as can be inferred from the case law of the ECtHR, systemic guarantees for the independence of domestic courts are perfectly amenable to judicial review by a supranational court.⁷⁷ The complexity of such an assessment does not necessarily require leaving the decision to a political body.

The Court's cautious approach in *LM* contrasts with its attitude in *ASJP*. The two cases are different in procedural terms, but in both cases, the source of controversy lay in domestic measures of general application which could affect judicial independence. *ASJP* concerned judicial independence in a direct manner. The preliminary question related to the lawfulness of a Portuguese measure of general application that reduced judicial salaries. *LM* concerned judicial independence in an indirect manner. The immediate subject-matter of the preliminary question was an adequate method for assessing the risk of an unfair trial following surrender to an issuing Member State. However, the question was made in the specific context of the controversial judicial reforms in Poland. As already argued, the Court must provide any interpretation of EU law it deems necessary to ensure that the law is observed in the main case and in similar cases in the future. And yet, in *LM* the Court showed self-restraint so as to preserve the competence of the European Council, even though fundamental rights and legal certainty might have necessitated an autonomous assessment of the Polish legal regime and a renunciation of the concrete prong.

In *ASJP*, on the contrary, the Court had invoked Article 19(1), para 2, TEU as a justiciable rule-of-law clause, which 'gives concrete expression' to the rule-of-law value enshrined in Article 2 TEU.⁷⁸ Under Article 19(1), para 2, TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' The Court linked the concept of 'effective legal protection'⁷⁹ from this provision to the concepts of an 'effective remedy' and a 'fair trial before an independent tribunal' contained in Article 47 of the Charter. On this basis, the Court assessed Portuguese provisions reducing judicial salaries. Contrary to the logic of the Charter and its Article 51(1), the Court disregarded whether the contested provisions implemented EU law. Instead, it held that what triggers the applicability of Article 19(1), para 2, TEU is that a concerned domestic court acts 'in the fields covered by Union law'. In other words, the Court found in Article 19(1), para 2, TEU an objective legal obligation to secure the independence of domestic courts. It is thus complementary to

⁷⁶ Arguably, due to the political nature of Article 7 TEU procedure, courts would not be bound by a decision of the Council (Article 7(1) TEU) or the European Council (Article 7(2) TEU) finding no risk or no breach to the rule of law. Courts would still be empowered and obliged, under Article 19(1) TEU and 47 of the Charter, to guarantee assessment of the chances for fair trials before independence judges.

⁷⁷ For instance, with regard to the Poland, see, ECtHR 30 November, 2010, Case 23614/08, *Henryk Urban and Ryszard Urban v. Poland*, paras. 45-46.

⁷⁸ *ASJP*, *supra* n. 7, para 32.

⁷⁹ There are linguistic differences between the various versions of this provision, and some stipulate 'effective judicial protection'. For instance, the French version stipulates '*protection juridictionnelle effective*' and the Italian one '*tutela giurisdizionale effettiva*'.

Article 47 of the Charter, which establishes a subjective right to an independent judge. Article 19(1), para 2, TEU abstracts from the issue of individual holders of substantive rights. It focusses on a domestic court, acting in its capacity as an EU court of general competence.⁸⁰ To assess domestic judicial independence under Article 19(1), para 2, TEU, the Court does not any longer need a direct link with a particular, substantive EU provision; an indirect link is sufficient.⁸¹ Such a reading of this provision's scope of application *ratione materiae* opened the door for infringement actions against the undermining of judicial independence in Poland⁸² and preliminary references in the cases of judges complaining about violations of their own guarantees of independence.⁸³

The Court's approach in *ASJP* is supported by the origins and purpose of Article 19(1), para 2, TEU and Article 47 of the Charter. By introducing both provisions in the Treaty of Lisbon, the Member States confirmed and codified the pre-Lisbon case law⁸⁴ according to which domestic courts are co-responsible for ensuring effective legal/judicial protection of Union rights. If effective judicial protection cannot be ensured directly by the Court in direct actions, the task falls to domestic courts. The Member States chose to confirm this principle expressly in the Treaty, instead of relaxing the *locus standi* criteria of individual direct actions before the Court.⁸⁵ Article 19(1), para 2, TEU confirms the bifurcated and decentralised nature of the EU judicial system, based on both the Court of Justice and domestic courts.⁸⁶ It is a unique provision inasmuch as it imposes requirements on the institutional systems of the Member States themselves, and not that of the Union. Most importantly, it also authorises the Court to enforce these requirements. The Court's reading of Article 19(1), para 2, TEU should not be seen as sudden and surprising. It has for quite some time been analysed as a provision with potentially far-reaching implications, possibly prompting the Court to further concretise and harmonise domestic obligations with regard to effective judicial protection.⁸⁷ The intensity of the Court's interference with domestic judicial procedure has varied,⁸⁸ but its mandate to impose

⁸⁰ ECJ 8 March 2011, Opinion 1/09, paras. 68-69. On objective principles, as opposed to subjective rights, and on the "radiation thesis", see Alexy, *supra* n. 45, pp. 352-354. See also, M. Krajewski, 'The Court of Justice and Athena's Dilemma', 3 *European Papers* (2018), p. 395-407.

⁸¹ M. Bonelli, M. Claes, 'Judicial Serendipity: How Portuguese judges came to the rescue of the Polish judiciary', 14 *EUConst* (2018).

⁸² Pending Case C-192/18, Application of 15 March 2018, OJ L 204, p. 23 (a case regarding ordinary courts); for information on the pending case regarding the Polish Supreme Court, see the Commission press release of 24 September 2018 available at <http://europa.eu/rapid/press-release_IP-18-5830_en.htm>, visited 12 October 2018.

⁸³ The preliminary reference from the Polish Supreme Court: order of 2 August 2018, Case III UZP 4/18 (Court of Justice Case C-522/18); order of 1 August 2018, Case III PO 6/19; order of 30 August 2018, Case III PO 7/18; order of 19 September 2018, Joined Cases III PO 8/18 and III PO 9/18; order of 3 October 2018, Case II PK 153/17. See also, the preliminary reference from the Regional Court in Warsaw, order of 8 September 2018, Case VIII K 146/18; and from the Regional Court in Łódź, order of 31 August 2018, Case I C 205/17.

⁸⁴ The European Convention, 'Final report of the discussion circle on the Court of Justice', 25 March 2003, CONV 636/03, para 18, available at <http://www.europarl.europa.eu/meetdocs_all/committees/conv/20030403/03c_en.pdf>, visited 2 September 2018.

⁸⁵ ECJ 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, paras. 40-41.

⁸⁶ T. Tridimas, 'The Court of Justice of the European Union', in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law* (Oxford University Press 2018), p. 581-609, at p. 582-584. See also, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Opinion of AG Kokott, paras. 34, 116 and 121.

⁸⁷ K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', (2007) *Common Market Law Review* 44, 1625-1659, at 1629. In this light, the opinion that the Court could 'reconfigure' the EU constitutional order by means of the application of Article 19(1) TEU in *ASJP* (see, Ovádek, *supra*, n. 9) seems to be much exaggerated.

⁸⁸ A. Arnulf, 'Remedies Before National Courts', in R. Schütze, T. Tridimas, *Oxford Principles of European Union Law* (Oxford University Press 2018), p. 1011-1039; J. Krommendijk, 'Is There Light on the Horizon? The Distinction Between "Reve Effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after *Orizonte*', 53 *Common Market Law Review* (2016), p. 1395 – 1418.

requirements regarding domestic remedies and procedures is well-established.⁸⁹ The Court has confirmed that domestic courts could even be required to create new remedies and legal avenues if the protection of EU rights could not otherwise be guaranteed.⁹⁰ In the post-Lisbon period, the Court has continued to specify the standards of effective judicial protection before domestic courts. For instance, it has specified rules regarding access to justice,⁹¹ court jurisdiction,⁹² procedural rights of the parties,⁹³ rules on evidence,⁹⁴ and remedies,⁹⁵ to name a few. The Court adjudicates issues relating to effective judicial protection before national courts on a regular basis.⁹⁶

The Court's strong mandate to concretise the standards of effective judicial protection is strongly supported, in my view, by teleological arguments. Enforcement of EU law has always been based on the vigilance of private parties willing to invoke their EU rights in domestic courts, oftentimes against the individual policies of Member States.⁹⁷ The procedure for preliminary references from domestic courts is perceived as the keystone of the autonomy of EU law and the "integration through law" paradigm.⁹⁸ The effective exercise of the Court's own mandate and the effectiveness of EU law depends on the independence and cooperation of domestic courts.⁹⁹ Domestic judicial independence thus becomes the foundation upon which EU constitutional structures are built.¹⁰⁰

Admittedly, the Court has been directly called upon to assess the independence of adjudicatory bodies – not even courts in the strict sense – on only two occasions.¹⁰¹ However, until recently problems with domestic judicial independence have not taken the form of deliberate attempts to subject judges to close political supervision. Moreover, the concept of effective judicial protection forms a coherent whole. Even though its different elements – e.g. access to justice, procedural fairness, judicial independence – can be distinguished for analytical purposes, they are, taken together, indispensable conditions for the rule of law. This is why they are all encompassed by Article 47 of the Charter and, under *ASJP*, should be relevant for the interpretation of Article 19(1), para 2, TEU.¹⁰² The latter's concept of 'remedies sufficient to ensure effective legal protection' is inextricably linked to judicial independence. One could hardly speak of effective legal protection worthy of the name if a

⁸⁹ See, for instance, M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004).

⁹⁰ ECJ 13 March 2007, Case C-432/05, *Unibet*, paras. 37-44.

⁹¹ ECJ 6 October 2015, Case C-61/14, *Orizzonte Salute*; ECJ 22 December 2010, Case C-279/09, *DEB*; ECJ 13 December 2017, Case C-403/16, *El Hassani*.

⁹² ECJ 6 September 2012, Case C-619/10, *Trade Agency*.

⁹³ ECJ 4 June 2013, Case C-300/11, *ZZ*.

⁹⁴ ECJ 27 September 2017, Case C-73/16, *Peter Puškár*, paras. 87-98.

⁹⁵ ECJ 14 March 2013, Case C-415/11, *Mohamed Aziz*.

⁹⁶ M. Safjan, D. Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU', *Yearbook of European Law* (2014), p. 3-40.

⁹⁷ A.-M. Burley, W. Mattili, 'Europe Before the Court: A Political Theory of Legal Integration', 47 *International Organizations* (1993), p. 41-76, at p. 60.

⁹⁸ ECJ 18 December 2014, Opinion 2/13 (EU Accession to ECHR), paras. 174-176.

⁹⁹ ECJ 6 March 2018, Case C-284/16, *Slovakia v Achmea*, paras. 35-37 and the case law cited.

¹⁰⁰ Independence is one of the criteria of a 'court of tribunal', within the meaning of Article 267 TFEU, which can make a preliminary reference to the Court. However, to broaden the access to preliminary reference procedure, the Court applies a 'lax criterion of judicial independence'. See Opinion of AG Colomer, 29 November 2001, Case C-17/00, *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*; Bonelli and Claes, *supra* n. 81.

¹⁰¹ ECJ 19 September 2006, Case C-506/04, *Wilson*; ECJ 31 January 2013, Case C-175/11, *H.I.D. & B.A. v Refugee Applications Commissioner*. In the latter case, the Court avoided the need to assess the independence of said adjudicatory body, having found that its decisions were subject to judicial review by courts in the strict sense.

¹⁰² *ASJP*, *supra* n. 7, paras. 40-41.

legal avenue was available for seeking a remedy, but the decision rested in the hands of a judge subordinated to political pressure.¹⁰³

For these reasons, the Court could, in my view, omit the concrete prong without encroaching upon the competence of the European Council. The competence of the Court under Articles 19(1) TEU and 47 of the Charter and the competence of the European Council under Article 2 and 7 TEU are parallel. However, in *ASJP*, the Court expressed willingness to use the potential of EU law to protect the independence of domestic courts, only to subsequently dilute it in *LM*. The Court took a step back with a view to maintaining mutual recognition and avoiding accusations that it had pre-empted a decision by the European Council. What we have thus observed was a clash of several constitutional norms: on the one hand, effective judicial protection and the competence of the Court and domestic courts to ensure it; on the other, mutual recognition and the competence of the European Council under Article 7 TEU. In *LM*, the Court curtailed effective judicial protection, instead prioritising mutual recognition and giving way to a decision by the European Council. This would seem to imply that the Court and domestic courts could never state that a situation regarding judicial independence in a Member State is so alarming that it requires the suspension of mutual recognition and judicial cooperation with that Member State. This seems to be the prerogative of the European Council and the Council, bodies composed of heads of state or heads of government, several of whom struggle with considerable rule-of-law problems themselves. Domestic courts are now doomed to perform a double test which might render judicial review of the risk of unfair trials excessively difficult, thus jeopardising the protection of fundamental rights.

CONCLUSIONS

Dashing the hopes of many commentators, the Court failed to use the full potential of Article 19(1), para 2, TUE and Article 47 of the Charter to consolidate domestic judicial independence by providing sanctions against Member States that had breached the values underpinning the system of mutual recognition. Neither did it provide an authoritative assessment of the recent reforms to the Polish judicial system. The Court tried to limit its interference into mutual recognition by prescribing a double test from *Aranyosi and Căldăraru*. But, in practice, the test renders excessively difficult the review by executing courts of the risk of unfair trials in Poland. The Court was overly concerned about the autonomy of a potential decision by the European Council under Article 7 TEU regarding the rule of law in Poland. In my view, the Court should have asserted its autonomous competence to scrutinise effective judicial protection of EU rights at the domestic level, as confirmed by the Treaty of Lisbon, which introduced Article 19(1), para 2, TEU. The competence of the European Council should be seen as parallel to that of the Court. Leaving the decision to suspend the EAW mechanism to the European Council and the Council – political bodies whose members may have a natural tendency to prioritise their own interest rather than the rule of law – seem doubtful in light of the EU commitment to fundamental rights and the rule of law. None of the governments of backsliding Member States have come back on the rule-of-law path due to a threat of Article 7 TEU sanctions, in the imposition of which they do not seem to believe.

¹⁰³ However, AG Øe proposed separating the issues of access to effective remedy and judicial independence in the interpretation of Article 19(1) TEU. Opinion of AG Øe in ECJ 18 May 2017, Case C-64/16, paras. 57-68.

The judgment in *LM* is a step backward from *ASJP*. In *ASJP*, judicial independence was treated as an objective obligation of the Member States subject to concretisation and application by the Court. In *LM*, it has been reduced to the subjective right of a particular individual to an independent court in a particular case as part of the right to a fair trial, which should be guaranteed by a narrowly-designed and difficult-to-perform test.¹⁰⁴ In my view, the difference in the Court's approach is not justified by the different procedural context of *ASJP* as opposed to *LM*. In both cases, the ultimate source of controversy lay in domestic measures of general application that could affect judicial independence. In both cases, the Court enjoyed the procedural freedom to provide any interpretation of EU law it deemed necessary to secure the effective judicial protection of EU citizens. Clearly, a preliminary ruling is not binding in the main case only; rather, it produces *erga omnes* effects. The Court should not stick to framing preliminary questions narrowly, merely to avoid tackling systemic problems with an EU concept as fundamental as judicial independence. It remains to be seen how the peer review of judicial independence will work in practice, and whether it will generate divergent decisions and prolong judicial proceedings. Initial experiences, however, have not been promising.

The Court will still have chances to enforce Article 19(1), para 2, TEU with regard to Poland. There are other cases currently pending before the Court regarding the independence of Polish judiciary: infringement proceedings involving ordinary courts¹⁰⁵ and preliminary references by the Polish Supreme Court and regional courts regarding the independence of rank-and-file judges.¹⁰⁶ However, the scope of the infringement proceedings is still too narrow to effectively remedy the rule-of-law crisis in Poland.¹⁰⁷ The Commission has focussed on the most evident breaches of judicial independence: the lowering of the retirement age of judges and the prolongation of their mandates by the Minister. However, it has failed to broach the crucial issues of new disciplinary proceedings for rank-and-file judges, the Minister's supervisory powers over court presidents, and the one-time packing of the Supreme Court with several dozen new judges, all of whom were appointed without any truly independent review of the candidates.¹⁰⁸ Challenging these 'reforms' under Article 19(1), para 2, TEU would require a creative interpretation of Article 19(1), para 2, TEU as there have not yet been relevant precedents before the Court of Justice. Such broader actions for infringement would involve, from the Commission's perspective, more risk. This may be the reason why the Commission has only focused on the most evident breaches of judicial independence in Poland. In my view, however, the disciplinary regime for judges, the Minister's supervisory powers over court presidents, and the packing of the Supreme Court with political appointees, are much more important for judicial independence than a retirement age for judges that is a few years higher or lower. The Polish courts have been trying to fill in the gaps in Commission infringement actions by means of preliminary reference. The Polish courts inquired at the Court of Justice about the lawfulness of the new disciplinary regime and the packing of the Supreme Court with political appointees, in particular the establishment of an entirely new Disciplinary Chamber.¹⁰⁹ It is not certain, however, whether the

¹⁰⁴ Frąckowiak-Adamska, *supra* n. 30.

¹⁰⁵ *Supra*, n. 82.

¹⁰⁶ *Supra*, n. 83.

¹⁰⁷ M. Taborowski, 'The Commission takes a step back in the fight for the Rule of Law', *Verfassungsblog*, 3 January 2018, available at <https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law>, visited 2 September 2018.

¹⁰⁸ On 11 October 2018, 27 new judges of the Supreme Court were appointed. See the press release available at <<http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=467-292d9931-9fa5-4b04-8516-5c932ff6bdf2&ListName=Wydarzenia>>, visited 12 October 2018.

¹⁰⁹ The Supreme Court of Poland, order of 30 August 2018, Case III PO 7/18.

questions are admissible as sufficiently linked to the main case.¹¹⁰ This confirms the previously expressed opinion that the main deficiency of the EU with regard to its ability to deal with the rule-of-law crises lies not in the limited nature of its law, but in the overly careful approach espoused by the Commission and other institutions.¹¹¹

¹¹⁰ S. Biernat, M. Kawczyńska, 'Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all', *Verfassungsblog*, 23 August 2018, available at < <https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/>>, visited 20 October 2018.

¹¹¹ L. Pech, D. Kochenov, 'Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation', 55 *Journal of Common Market Studies* (2016), p. 1062-1074, at p.1065.